

**BEFORE THE MERIT EMPLOYEE RELATIONS BOARD
OF THE STATE OF DELAWARE**

GRIEVANT,)	
)	
Employee/Grievant,)	
)	DOCKET No. 10-01-464
)	
v.)	
)	
DEPARTMENT OF HEALTH AND)	PUBLIC DECISION AND
SOCIAL SERVICES,)	ORDER <i>(Redacted)</i>
)	
Employer/Respondent.)	

After due notice of time and place this matter came to a hearing before the Merit Employee Relations Board (the Board) at 9:00 a.m. on January 30, 2013 at the Department of Transportation, 800 South Bay Road, First Floor Hearing Room, Dover, DE 19901.

BEFORE Martha K. Austin, Chair, Dr. Jacqueline Jenkins, John F. Schmutz, Paul R. Houck, and Victoria D. Cairns, Members, a quorum of the Board under 29 *Del. C.* §5908(a).

APPEARANCES

W. Michael Tupman
Deputy Attorney General
Legal Counsel to the Board

Deborah L. Murray-Sheppard
Board Administrator

Kevin R. Slattery
Deputy Attorney General
on behalf of the Department of Health
and Social Services

Roy S. Shiels, Esquire
on behalf of the Employee/Grievant

BRIEF SUMMARY OF THE EVIDENCE

The Department of Health and Social Services (DHSS) offered and the Board admitted into evidence twelve documents pre-marked for identification as Exhibits A-L.

DHSS called six witnesses: Jerry Passwaters, Investigator; Carlene Bond, Registered Nurse; Charlotte Brown, Director of Residential Services, Stockley Center; Dr. Thomas Kelly, former Medical Director, Stockley Center; Dr. Emad Shoukry, former Staff Physician; and Marie Hitchens, Nurse Supervisor, Stockley Center.

The employee/grievant (Grievant) offered and the Board admitted into evidence fourteen documents pre-marked for identification as Exhibits 1-8, 10-14, and 16.

The Grievant testified on her own behalf. At her request, the Board issued a subpoena to Dr. Judy L. Bailey. Dr. Bailey (who is retired) did not appear for the hearing.

According to the Grievant's counsel, he tried to contact Dr. Bailey prior to the hearing and left her phone messages but she did not return his calls. According to the Grievant's counsel, Dr. Bailey is a critical witness and he asked the Board to continue the hearing (after hearing all the other evidence) to take her testimony. ¹

The Board asked the Grievant's counsel for a proffer of Dr. Bailey's expected testimony. He proffered that Dr. Bailey would testify: (1) doctors at the Stockley Center did not always enter verbal orders into the Physician's Order Sheet; and (2) she believed that add-on blood tests for a patient ("SR") were appropriate given her medical condition. In response to questions from the Board, the grievant's counsel stated that Dr. Bailey would not testify that she was the one who

¹ It is problematic whether Dr. Bailey would appear at a future hearing even if the Board issued another subpoena. The Grievant's counsel would then have to petition the Superior Court for an order to compel her attendance, and she still might not appear even at the risk of being in contempt of court. This case has been pending for over three years and the Board is reluctant to countenance any further delay.

authorized the add-on blood tests.

A majority of the Board (3-2) agreed that Dr. Bailey's testimony would not be necessary to reach an informed decision in this case. Even if Dr. Bailey testified that she believed the add-on tests were appropriate, at most that might give rise to an inference that a doctor ordered them, not prove that a doctor did. Even if Dr. Bailey testified that doctors did not always enter verbal orders into the Physician's Order Sheet, that would not prove that a doctor neglected to do so in this case.

FINDINGS OF FACT

Prior to her termination on January 15, 2010, the Grievant was a Laboratory Technician III at the Stockley Center.

The Stockley Center provides rehabilitative training, health care, family services, and residential services for individuals with developmental disabilities.

During the relevant time (June-July, 2009), the Grievant was the sole lab technician at the Stockley Center. Her responsibilities included drawing blood from patients at the direction of a doctor and sending the samples to a private vendor, Laboratory Corporation of America (LabCorp), for analysis.

LabCorp sent the blood test results electronically to a printer at the Stockley Center. According to the Grievant, she would collect the test results at the printer, date/time stamp them, and place them in one of the doctor's in-boxes. Some of the doctors had their own in-box; others shared an in-box.

The test results indicate the date the blood was drawn, the date LabCorp received the sample, and the date LabCorp reported the test results to the Stockley Center. The test results

indicate the “Referring Physician.” One of the doctors at the Stockley Center (not necessarily the referring physician) would review the test results and then initial or sign and date at the bottom of the page.

During the relevant time, there were several doctors at the Stockley Center: Dr. Udezulu; Dr. Bailey; Dr. Thomas Kelly; and Dr. Emad Shoukry. Dr. Kelly was the part-time Medical Director. Dr. Shoukry worked every other week. Dr. Udezulu left the Stockley Center sometime in June or July of 2009.²

One of the patients at the Stockley Center was SR, described by witnesses as a “medically fragile patient.” She suffered from various ailments, including digestive disorders which required a feeding tube. Dr. Kelly was treating her for cellulitis (a skin infection). Any of the doctors at the Stockley Center may have provided medical care for SR depending on who was available at the time.

On July 2, 2009, Dr. Shoukry ordered a blood test of SR for “CBC w/ Diff [complete blood count with differential/platelet] & BMP [basic metabolic panel].” Dr. Kelley reviewed and initialed the LabCorp test results on July 6, 2009. According to Dr. Kelly, these tests were appropriate because of SR’s cellulitis and the results were somewhat “high” indicating an infection.

On July 8, 2009, the Grievant filled out a Request for Add-On Testing of the blood sample drawn from SR on July 2, 2009. The request asked LabCorp to test for “ANA, ANCA, CRP, RF, and HCV antibody.” According to Dr. Kelly, a doctor would only order those tests if he or she believed that SR might be suffering from an auto-immune disease like lupus or

² Dr. Udezulu’s name continued to appear on some LabCorp test results as the “Referring Physician” because for a while no one corrected that data field.

rheumatoid arthritis or from hepatitis C. According to Dr. Kelley, SR had not been diagnosed with any of those conditions. The Grievant signed the request for add-on testing under “Signature of Physician (or authorized designee).” According to Dr. Kelly, the results of the add-on testing were all negative.

On July 13, 2009, Dr. Shoukry ordered further blood testing for SR (basic metabolic panel, complete blood count, and comprehensive metabolic panel). Dr. Pamintuan, who had recently joined the Stockley Center medical staff, reviewed the test results on July 29, 2009. There were some elevated levels but the overall results were negative.

On July 21, 2009, the Grievant filled out a Request for Add-On Testing asking LabCorp to do additional tests (EGFR [epidermal growth factor receptor] and electrolyte panel) on the blood drawn from SR on July 13, 2009. On July 21, 2009, LabCorp reported back: “There is no longer any sample available.”³

According to the Grievant, she was authorized to request the add-on tests for the July 2 and July 13, 2009 blood samples. The Grievant could not recall who authorized the add-on testing. Under questioning from the Board, she testified that a doctor authorized one of the draws and a nurse authorized the other, but she could not remember the name of either the doctor or the nurse. The Grievant testified that she often received verbal orders from doctors by e-mail or telephone. For the add-on tests in question, she testified that the verbal orders were by telephone which is why she did not have a written record of the order. *See Exhibit 8* (e-mail

³ DHSS claims that the Grievant made two more unauthorized requests for add-on testing (Exhibits E and F). There is no evidence in the record that the Grievant played any role in those testing requests. *Compare with* Exhibits D and G (both requests signed by the Grievant). DHSS believes it must have been the Grievant because she was the only lab technician at the Stockley Center at the time. It is equally plausible that a doctor could have requested additional tests by LabCorp when she was not at work.

dated July 30, 2009 from Dr. Bailey to the Grievant to “ask LabCorp to add a TSH [thyroid-stimulating hormone] to the blood drawn on [JS] yesterday.”).

Dr. Kelly testified that he did not authorize any of the add-on blood tests for SR. He testified that he has never ordered one of these tests for any patient and never would. He testified that he thought very highly of the Grievant’s dedication to her profession. Dr. Kelly testified that he would like to be able to say he had authorized the add-on tests but he could not because that would be a lie.

Dr. Shoukry testified that he did not authorize any of the add-on blood tests for SR. He testified that the lupus and rheumatoid arthritis tests would not have been appropriate for SR because she had not been diagnosed with either of those conditions.

DHSS tried to prove that the Grievant did not have a doctor’s authorization by inference. According to DHSS, while verbal orders are not uncommon, the protocol is that any verbal order is later memorialized in the Physician’s Order Sheet. *See, e.g.*, Exhibit I, p. 1009 (“CBC, CMP on 7/13/09”).

According to the Grievant, doctors did not always follow through to memorialize verbal orders in the Physician’s Order Sheet and she did not have any control over whether they did or not.

According to DHSS, the Grievant admitted to requesting unauthorized tests in a conversation with Carlene Bond, a Registered Nurse at the Stockley Center, in August 2009. According to Bond’s written statement (not prepared until November 1, 2009), the Grievant told her: “The doctors are missing something with her [SR]. I think maybe even lupus or cancer. I can’t believe they are not being more aggressive in finding out what it is. On the last blood drawn from her, I even added more tests, a bunch of them, just to check on my own, but so far

nothing has come up.”

Bond did not immediately report what the Grievant told her in August 2009. Bond explained that she couldn’t believe that the Grievant would have done something like that, “I thought it was just talk at the time.” However, during an unrelated conversation with the Nursing Supervisor, Marie Hitchens, six weeks later, Bond had second thoughts and told Hitchens what the Grievant had said about the additional tests.

An investigation ensued. By letter dated December 8, 2009, DHSS notified the Grievant of its intent to terminate “for misconduct and fraud by misappropriating Medicare and Medicaid funds, by adding lab tests to the lab slips without a physician’s order and practicing medicine without a license.”⁴

After a pre-termination meeting on December 18, 2009, the Secretary of DHSS, Rita A. Landgraf, terminated the Grievant by letter dated January 15, 2010.

CONCLUSIONS OF LAW

Merit Rule 12. 1 provides:

Employees shall be held accountable for their conduct. Disciplinary measures up to and including dismissal shall be taken only for just cause. “Just cause” means that management has sufficient reasons for imposing accountability. Just cause requires: showing that the employee has committed the charged offense; offering specified due process rights specified in this chapter; and imposing a penalty appropriate to the

⁴ The Board bases its decision solely on the second offense: “adding lab slips without a physician’s order.” DHSS did not present any evidence to prove that the Grievant committed Medicaid/Medicare fraud. In fact, DHSS received \$3,500.00 in Medicaid/ Medicare funds for the tests (one test, costing \$105.00, was disallowed). DHSS did not refer the Grievant to the Medicaid/Medicare Fraud Unit at the Department of Justice and did not reimburse the monies. DHSS did not present any evidence to prove that the Grievant engaged in the unlawful practice of medicine and apparently did not file a complaint against her with the Board of Medical Practice.

circumstances.

“The burden of proof in employee dismissal proceedings is well established in Delaware. When the State terminates a person’s employment, the MERB presumes that the State did so properly.” *Avallone v. DHSS*, 14 A.3d 566, 572 (Del. 2011) (en banc). See 29 Del. C. §5949(b) (“The burden of proof of any such appeal to the Board or Superior Court is on the employee.”). “Thus, [the grievant] is required to prove the absence of ‘just cause.’ as that term was defined in Merit rule 12.1.” *Avallone*, 14 A.3d at 572.

A majority of the Board concludes as a matter of law that the Grievant did not meet her burden to prove that DHSS did not have sufficient reason to terminate her for adding lab tests without a doctor’s order. DHSS may not have presented conclusive evidence that a doctor did not authorize the add-on tests, but then neither did the Grievant present conclusive evidence that they were. On the basis of this evidentiary record, the Board can only fall back on the burden of proof – the Grievant’s burden of proof – which she did not meet.

The issue then remains whether the penalty of termination was appropriate to the circumstances. DHSS did not present any evidence of prior disciplinary actions against the Grievant. However, “[i]t is well settled in Delaware law that even a single act of misconduct may constitute ‘just cause’ for terminating an employee. An employer is not obligated to withstand multiple acts of serious misconduct before termination is appropriate.” *Travis v. DNREC*, MERB Docket No. 12-04-541, at p.8 (Oct. 31, 2012) (quoting *Green-Hayes v. Department of Labor*, C.A. No. N12A-02-011-PLA, 2012 WL 351822, at p.3 (Del. Super., Aug. 8, 2012)).

A majority of the Board concludes as a matter of law that the penalty of termination was appropriate to the circumstances. The Grievant may have sincerely felt that SR was not getting


the proper medical treatment. But the Grievant did not have any medical training and scatter-gun additional tests were no more than a shot in the dark. The Grievant had other remedies which had a far better chance of advocating for SR. The Grievant could have talked with her supervisor, or even with the Executive Director of the Stockley Center. As a last resort she could have called the hot line at the Division of Long Term Care Residents Protection to report patient abuse.

If it is true – and the Grievant could not prove otherwise – that she instead took it upon herself to second-guess SR’s doctors and order add-on blood tests without authorization, then a majority of the Board believes that is a terminable offense. To efficiently and effectively care for patients, a facility like the Stockley Center must depend on the integrated services provided by various health care providers: doctors; nurses; lab technicians; and other staff. Those groups must work in harmony and respect each other’s areas of expertise. It cannot be tolerated for a lab technician to usurp the role of the doctors in trying to diagnose patients.

DECISION AND ORDER

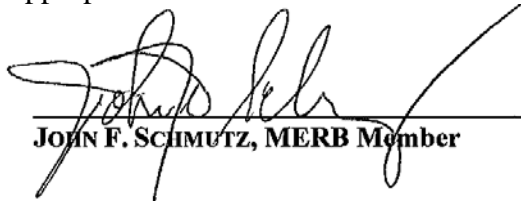
It is this **11th** day of February, 2013, by a vote of 3-1, the Decision and Order of the Board to deny the Grievant’s appeal.


MARTHA K. AUSTIN, MERB Chairwoman


JACQUELINE D. JENKINS, EDD, MERB Member


VICTORIA D. CAIRNS, MERB Member

I respectfully dissent in part because I do not believe that the penalty of termination was appropriate to the circumstances.



JOHN F. SCHMUTZ, MERB Member

I respectfully dissent. I do not believe that DHSS had just cause to terminate the Grievant because I do not believe she committed the charged offenses.



PAUL R. HOUCK, MERB Member

APPEAL RIGHTS

29 *Del. C.* §5949 provides that the grievant shall have a right of appeal to the Superior Court on the question of whether the appointing agency acted in accordance with law. The burden of proof on any such appeal to the Superior Court is on the grievant. All appeals to the Superior Court must be filed within thirty (30) days of the employee being notified of the final action of the Board.

29 *Del. C.* §10142 provides:

- (a) Any party against whom a case decision has been decided may appeal such decision to the Court.
- (b) The appeal shall be filed within 30 days of the day the notice of the decision was mailed.
- (c) The appeal shall be on the record without a trial de novo. If the Court determines that the record is insufficient for its review, it shall remand the case to the agency for further proceedings on the record.
- (c) The court, when factual determinations are at issue, shall take due account of the experience and specialized competence of the agency and of the purposes of the basic law under which the agency has acted. The Court's review, in the absence of actual fraud, shall be limited to a determination of whether the agency's decision was supported by substantial evidence on the record before the agency.

Mailing date: **February 11, 2013**

Distribution:

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Agency's Representative
Board Counsel
OMB/HRM